In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 700

HOWARD HUNT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 400 F. 2d 306.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1968. A petition for rehearing was denied on October 8, 1968. The petition for a writ of certiorari was filed on October 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for conspiring to impede a witness before a federal grand jury, the evidence was sufficient to show that the person impeded was a "witness" within the meaning of 18 U.S.C. 1503 and that petitioner had knowledge of that fact.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Western District of Texas of conspiring to impede one Leyva in testimony before a federal grand jury (18 U.S.C. 1503, 371).[1] He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A).

The essential facts, which are not in dispute, are set forth in the opinion below (Pet. App. A2). Petitioner was retained as attorney for Candelario and Daniel Guerrero, who had been charged in separate complaints with violations of the federal narcotic laws. At a preliminary hearing on May 2, 1966, petitioner learned the identity of the informer, Leyva, to whom the Guerrero brothers allegedly sold narcotics.[2] The commissioner ordered the Guerreros bound over for the grand jury, and Leyva subsequently testified as to the narcotics charges before the grand jury (Tr. 1005-1007, 1023, 1027-1028, 1139, 1170).[3]

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[1] Petitioner was indicted with eight others but was tried alone.

[2] Petitioner subpoenaed Leyva to testify before the commissioner, but he was not called by either side.

[3] "Tr." refers to the transcript of proceedings at trial, a copy of which is on file with the Clerk of this Court.

On May 3, the day following the preliminary hearing, Leyva was lured to a bar and was pistol-whipped and severely beaten by some of petitioner's co-indictees. Petitioner was summoned, and he questioned Leyva about the case against Daniel Guerrero. When the police arrived unexpectedly at the bar, Leyva was taken forcibly by the co-indictees to the house next door and thence to another house, where his life was again threatened. Petitioner was summoned to the house, where Leyva agreed to give him information about the Guerrero cases in exchange for his release. Petitioner then took Leyva to his office and dictated a statement for Leyva to sign. After Leyva signed the statement, petitioner took him to a hospital, where he remained for three or four days (Tr. 1089-1116).

ARGUMENT

Petitioner contends that the proof was insufficient to show that Leyva was a "witness" within the meaning of 18 U.S.C. 1503 or that petitioner had knowledge of that fact. The court of appeals correctly held, however (Pet. App. A3), that the statute was intended to protect not only those persons who had been formally called as witnesses in a proceeding *in esse*, but also those who were expected to be called to testify. The term "witnesses" in the statute has uniformly been interpreted as extending to persons in Leyva's situation. See, *e.g.*, *Odom* v. *United States*, 116 F. 2d 996 (C.A. 5), reversed on other grounds, 313 U.S. 544; *United States* v. *Grunewald*, 233 F. 2d 556, 571 (C.A. 2), reversed on other grounds, 353 U.S. 391; *United States* v. *Perlstein*, 126 F. 2d 789 (C.A. 3), certio-

rari denied, 316 U.S. 678; *Stein* v. *United States*, 337 F. 2d 14, 21-22 (C.A. 9), certiorari denied, 380 U.S. 907. From evidence that Leyva possessed critical information about the narcotics charges and had given that information to the government, the jury could reasonably conclude that Leyva was expected to be a witness in subsequent proceedings. Since petitioner knew that Leyva was the informer, the jury could also reasonably conclude that petitioner had the requisite scienter to support his conviction—*i.e.*, a "reasonably founded belief that [Leyva was] a witness (he being such in fact)." *Odom* v. *United States*, *supra*, 116 F. 2d at 999.

CONCLUSION

For the foregoing reasons, it is respectfuly submitted that the petition for a writ of certiorari should be denied.

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